Supreme Court, U.S.
FILED
MAR 23 1993
OFFICE OF THE CLERK

No. 92-1488

In The

# Supreme Court of the United States

October Term, 1992

ROGER A. PETERSON,

*Petitioner,*

vs.

R. H. STAFFORD, WASHINGTON COUNTY AUDITOR, ET AL.,

*Respondents.*

**Petition For Writ Of Certiorari To The Supreme Court Of Minnesota**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Do the designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), to be stated on the ballot in a judicial election, which inform the voters of the name of the person who currently fills that judicial office, violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE PETITION ..... 5

I. THE MINNESOTA SUPREME COURT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND WITH OTHER COURT DECISIONS UPHOLDING SIMILAR STATUTES ..... 5

A. The Minnesota Supreme Court Properly Upheld The Statutes Under the Rational Basis Test ..... 6

1. The rational basis test is the proper standard in this case ..... 7

2. The *Anderson* decision rested on First Amendment grounds and does not apply in this case ..... 11

B. Minn. Stat. § 204B.36, Subds. 4 And 5 (1992), Are Rationally Related To A Legitimate State Interest ..... 13

1. The incumbency designation required by Minn. Stat. § 204B.36, subd. 5 (1992), is supported by the rational basis test .... 14

2. The statutory requirement to indicate on the ballot the name of the justice whose seat is up for election is supported by the rational basis test ..... 22

TABLE OF CONTENTS – Continued

Page

II. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION PERTAINING TO STATE ELECTION LAWS ..... 25

CONCLUSION ..... 28

# TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

First Amendment ..... 6, 11, 12, 13, 26

Fourteenth Amendment, Equal Protection Clause *passim*

MINNESOTA CONSTITUTION AND STATUTES

Minn. Const. art. VI, § 7 ..... 16

Minn. Stat. § 204B.06, subd. 6 (1992) ..... 22

Minn. Stat. § 204B.36, subd. 4 (1992) ..... *passim*

Minn. Stat. § 204B.36, subd. 5 (1992) ..... *passim*

Minn. Stat. § 204B.44 (1992) ..... 4

Minn. Stat. § 204D.08, subd. 3 (1992) ..... 2

Minn. Stat. § 204D.14 (1992) ..... 2, 23

FEDERAL DECISIONS

Anderson v. Celebrezze, 460 U.S. 780 (1983) .. 7, 11, 12, 13

Anderson v. Martin, 375 U.S. 399 (1964) ..... 9

Binkowski v. Miller, 411 U.S. 901 (1973) ..... 17, 18

Bd. of Election Comm'rs v. Libertarian Party, 591 F.2d 22 (7th Cir.), cert. denied sub nom. Libertarian Party of Illinois v. Bd. of Election Comm'rs, 442 U.S. 918 (1979) ..... 24

Bohus v. Bd. of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971) ..... 24

Bullock v. Carter, 405 U.S. 134 (1972) ..... 8, 9, 26

Burdick v. Takushi, ___ U.S. ___, 112 S. Ct. 2059, 2063 (1992) ..... 8

TABLE OF AUTHORITIES – Continued

Page

Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976) .*passim*

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) ..... 8, 9, 25, 26

Herb v. Pitcairn, 324 U.S. 117 (1945) ..... 16

Hill v. Stone, 421 U.S. 289 (1975) .....8, 26

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) ..... 6

Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977) .... 24

Kusper v. Pontikes, 414 U.S. 51 (1973) .....8, 26

McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980).....9, 23

New Orleans v. Dukes, 427 U.S. 297 (1976)..... 13

Nordlinger v. Hahn, ___ U.S. ___, 112 S. Ct. 2326 (1992) ..... 13

Plyler v. Doe, 457 U.S. 202 (1982)..... 7

Southern Railway Co. v. Seabord Milling Co., 442 U.S. 444 (1979), 99 S. Ct. 2388 (1979) ..... 18

Stiles v. Hunt, 912 F.2d 260 (8th Cir. 1990)..... 8

Tigner v. Texas, 310 U.S. 141 (1940)..... .. 6

Voltaggio v. Caputo, 210 F. Supp. 337 (D.N.J. 1962), app. dismissed as moot, 371 U.S. 232 (1963) ..... 24

Williams v. Rhodes, 393 U.S. 23 (1968) .....9, 26

TABLE OF AUTHORITIES – Continued

Page

Williamson v. Fortson, 376 F. Supp. 1300 (N.D. Ga. 1974) ..... *passim*

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) ..... 16

STATE COURT DECISIONS

Foley v. Donovan, 274 Minn. 501, 144 N.W.2d 600 (1966) ..... 14, 15

Gould v. Grubb, 536 P.2d 1337 (Cal. 1975) ..... 11, 25

Gustafson v. Holm, 232 Minn. 68, 44 N.W.2d 443 (1950) ..... 11, 20, 21, 22

Rees v. Layton, 6 Cal.App.3d 815, 86 Cal. Rptr. 268 (Cal. Ct. App. 1970) ..... 21, 22

Peterson v. Stafford, 490 N.W.2d 418 (Minn. 1992) ..... 5, 14, 15, 16

Salinger v. Jordan, 395 P.2d 49 (Cal. 1964) ..... 24

Ulland v. Growe, 262 N.W.2d 412 (Minn.), cert. denied sub nom. Berg v. Growe, 436 U.S. 927 (1978) ..... 11, 24

OTHER AUTHORITIES

Maurice Kelman, Ballot Designations: A Second Look, 35 Wayne L. Rev. 63 (1988) ..... 17, 18

Sup. Ct. R. 10.1 ..... 5

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**Petition For Writ Of Certiorari To The Supreme Court Of Minnesota**

## BRIEF IN OPPOSITION

The respondents Joan Growe, Secretary of State of the State of Minnesota, and Washington County Auditor R.H. Stafford respectfully request that this Court deny the Petition for Writ of Certiorari (hereinafter "Pet.") seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court is reported at 490 N.W.2d 418 and is reproduced in the appendix to the petition (hereinafter "Pet. App.") at page 3A.

## STATEMENT OF THE CASE

On July 21, 1992, Roger A. Peterson filed for candidacy to the office of Associate Justice of the Minnesota Supreme Court, seeking the seat held by Justice Sandra Gardebring. Pet. at 6. A person who files as a candidate for the office of Associate Justice of the Minnesota Supreme Court must state in his or her affidavit of candidacy the office of the particular justice or judge for which the individual is a candidate. Minn. Stat. § 204B.06, subd. 6 (1992). Each justice of the Minnesota Supreme Court is "deemed to hold a separate nonpartisan office." *Id.* The ballots for the primary and general elections for positions on the Minnesota Supreme Court are required by Minn. Stat. § 204B.36, subd. 4 (1992) to be printed with the title of the office as follows.

(a) In the case of the supreme court:

"Chief justice (or associate justice) – supreme court (last name of incumbent) seat."

In addition Minn. Stat. § 204B.36, subd. 5 (1992) provides: "If a chief justice, associate justice, or judge is a candidate to succeed again, the word 'incumbent' shall be printed after that judge's name as a candidate."

Pursuant to Minn. Stat. § 204D.14 (1992), in a nonpartisan election the names of candidates must be rotated with the names of the other candidates for election to the office so that the name of each candidate appears substantially an equal number of times at the top, at the bottom, and at each intermediate place in that group of candidates. *See* Minn. Stat. § 204D.08, subd. 3 (1992). To comply with the rotation requirement in an election with only two candidates, as in the present case, two different

styles of ballots were printed,[1] one style listing Peterson first in order and the other listing him second, as follows:

**Style 1**

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

_____

ROGER A. PETERSON

_____

SANDRA S. GARDEBRING Incumbent

_____

**Style 2**

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

_____

SANDRA S. GARDEBRING Incumbent

_____

ROGER A. PETERSON

_____

[1] Because the election occurred after the Minnesota Supreme Court's decision in this case, the actual printed ballots used in the election are not in the record. Peterson acknowledges the rotation requirement, Pet. at 23 n.4, 26, and does not dispute the fact that the ballots were printed and distributed in accordance with all statutory requirements.

*Id.* These two different styles of ballots were required to be distributed in such a way that half the voters received one style of ballot and half the voters received the other style, thus minimizing any perceived advantage that one candidate would have over the other as a result of appearing first on the ballot. Affidavit of Secretary of State Joan Growe, ¶ 4.

Prior to the election, on September 1, 1992, Peterson filed with the Minnesota Supreme Court his Petition Filed Pursuant to Minnesota Statute § 204B.44. Pet. App. at 18A. Peterson alleged in the petition that the designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), deny him and all other parties similarly situated equal protection and due process in violation of the United States and Minnesota Constitutions. At no time during the proceedings before the Minnesota Supreme Court did Peterson attempt to introduce evidence demonstrating that the challenged statutes have an impact on judicial elections by providing an advantage to incumbents. Although Peterson repeatedly asserts that the challenged statutes provide advantages to incumbents which make it "virtually impossible" for a non-incumbent to prevail in a judicial election, Pet. at 15, 16, there is not a shred of evidence in the record even attempting to show that it is "virtually impossible" to unseat an incumbent in a judicial election in Minnesota.

In its decision dated October 9, 1992, the Minnesota Supreme Court rejected Peterson's claims, holding that the statutes satisfied the Equal Protection Clauses of both

the state and federal constitutions.[2] *Peterson v. Stafford*, 490 N.W.2d 418, 424 (Minn. 1992), Pet. App. at 16A.

The election was held in November, 1992. Pet. at 2. Associate Justice Gardebring was re-elected.

## REASONS FOR DENYING THE PETITION

A petition for certiorari is granted by this Court "only when there are special and important reasons therefore." Sup. Ct. R. 10.1. Review may be granted when a state court has decided a federal question in a way that conflicts with decisions of this Court or other courts or when a state court has decided an "important question of federal law which has not been, but should be, settled by this Court." *Id.* This case, however, does not meet these standards and, therefore, the petition should be denied.

### I. THE MINNESOTA SUPREME COURT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND WITH OTHER COURT DECISIONS UPHOLDING SIMILAR STATUTES.

The Minnesota Supreme Court held that the ballot designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As demonstrated below, this decision is consistent with the well-understood principles of equal protection established by this

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[2] Because Peterson's due process claim was not addressed in Peterson's brief in the Minnesota Supreme Court, the claim was not addressed in the Minnesota Supreme Court's decision.

Court. The decision is also consistent with previous court decisions upholding the constitutionality of similar statutes.

## A. THE MINNESOTA SUPREME COURT PROPERLY UPHELD THAT STATUTES UNDER THE RATIONAL BASIS TEST.

Peterson argues that the designation required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[3] The Equal Protection Clause provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Despite the breadth of this language, this Court has recognized that a state is not required to treat all persons alike. *Tigner v. Texas*, 310 U.S. 141, 147 (1940). As this Court stated in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985):

> Generally, a law will survive that scrutiny [under the Equal Protection Clause] if the distinction rationally furthers a legitimate state purpose.

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[3] There are references in the Petition and in the brief of the *amicus curiae* Minnesota Civil Liberties Union to infringement on the First Amendment right of voters. However, this case does not present a First Amendment issue to this Court. No First Amendment issue was raised in the Minnesota Supreme Court, nor was any First Amendment issue argued before or decided by the Minnesota Supreme Court.

However, if a law operates to the peculiar disadvantage of a suspect class or interferes with the exercise of a fundamental right, the law is subject to strict scrutiny, in which case the classification must further a compelling governmental interest which cannot be served by an alternative means less burdensome to the suspect class or fundamental right. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982).[4] As the discussion below demonstrates, the Minnesota Supreme Court properly subjected the challenged statutes to the rational basis test, not to strict scrutiny. Peterson also raises for the first item in this case the issue of whether the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), established a separate equal protection standard applicable only to challenges to state election laws and whether that standard should be applied here. Pet. at 16-17. As discussed below, the *Anderson* balancing test does not apply in this case.

**1. The rational basis test is the proper standard in this case.**

The Minnesota statutes challenged in this case merely apprise the voters of which of the seats on the state supreme court is being contested and which of the candidates is the incumbent. The statutes do not operate to the peculiar disadvantage of a suspect class or interfere with the exercise of a fundamental right. Although legislative enactments which directly infringe upon the exercise of

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[4] This Court has also applied an intermediate level of scrutiny to certain classifications, not relevant here, where the classification "gives rise to recurring constitutional difficulties, such as those based on alienage, gender, or illegitimacy." *Id.*

the political franchise are subject to "strict scrutiny" review, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), not every law that imposes any burden upon the right to vote is subject to strict scrutiny. *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. 2059, 2063 (1992). As this Court observed in *Burdick*, all election laws impose some burden upon individual voters, and to subject every voting regulation to strict scrutiny "would tie the hands of the States seeking to assure that elections are operated equitably and efficiently." *Id.*

There was no evidence before the Minnesota Supreme Court demonstrating that the challenged statutes in any way infringe upon the right to vote. Instead, the statutes relate to the manner in which candidates run for office. The Eighth Circuit has recently observed that "the right to run for office, unlike the right to vote, is not a fundamental right." *Stiles v. Hunt*, 912 F.2d 260, 265 (8th Cir. 1992), citing *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849 (1972).

The challenged statutes are not subject to strict scrutiny because they *do not* impose the type of restrictions on the fundamental right to vote that have been held by this Court to warrant strict scrutiny. They do not limit the right to vote to certain classes of persons, *Hill v. Stone*, 421 U.S. 289 (1975) (limiting voting in city bond elections to persons who pay property taxes in the city). They do not prevent a person from voting for different political parties within a certain time frame, *Kusper v. Pontikes*, 414 U.S. 51 (1973) (prohibiting a person from voting in the primary election of a political party if the person voted in the primary of another party within the preceding 23 months). They do not impose prohibitively burdensome

candidate filing fees, *Bullock v. Carter*, 405 U.S. 134 (1972). They do not restrict the ballot to candidates of only certain political parties, *Williams v. Rhodes*, 393 U.S. 23 (1968). They do not make payment of a fee a prerequisite to voting, *Harper v. Virginia Board of Elections*, 383 U.S. 664 (1966). They also do not involve suspect classes, as in *Anderson v. Martin*, 375 U.S. 399 (1964), where the candidate's race was required to be printed on the ballot. Thus the statutes are subject to the rational basis test under the Equal Protection Clause of the Fourteenth Amendment.[5]

The applicability of the rational basis test to the statutes here is supported by the decision in *Clough v. Guzzi*, 416 F.Supp. 1057 (D.Mass. 1976). In *Clough*, the challenged statutes provided that the incumbents' names would appear first on all ballots and that the names be followed by the designation "incumbent". The plaintiff alleged that the fundamental right to vote was being infringed by the statute. *Id.* at 1066. The court stated that in order to determine whether the statute was subject to strict scrutiny required "an examination 'in a realistic light' of the extent and nature of the impact of the questioned practice on the right to vote." *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The court rejected the plaintiff's argument that the challenged statute had the

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[5] Peterson cites *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980), for the proposition that "the manipulation of the information provided on the ballot has an effect on the fundamental right to vote," Pet. at 14, thus implying that strict scrutiny was applied in that case to a ballot format statute. However, the Eighth Circuit did not apply strict scrutiny, noting that "most courts have applied the rational basis test" to ballot format statutes. 637 F.2d at 1167.

effect of providing incumbents such an unfair advantage, by giving them the windfall vote, that it diluted the weight of the vote of voters who support the class of non-incumbents. The court stated:

> [T]he dilution effect here depends upon the existence of a pool of presumably uninformed voters. Yet non-incumbents and their supporters have access to those voters and may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical bias. Furthermore, the impact of the Massachusetts statutes on the total vote is not so clear that we can really define with anything approaching certainty . . . how significantly the state is directly affecting the weight of anyone's vote.

416 F. Supp. at 1067. The court concluded that, even assuming some positional advantage, the voters' right to choose among candidates was not sufficiently infringed as to warrant strict scrutiny. *Id.* Peterson also argues that the incumbency designations of Minn. Stat. § 204B.36, subds. 4 and 5 (1992) "dilute the weight of the votes of all the electors who cast their votes for non-incumbents." Pet. at 20. As in *Clough*, Peterson's dilution argument has no merit, and strict scrutiny is not applicable.

The applicability of the rational basis test to the statutes here is also supported by the decision in *Williamson v. Fortson*, 376 F. Supp. 1300 (N.D. Ga. 1974), which involved a Georgia statute that required the incumbency of a candidate seeking party nomination to be indicated on the ballot for the primary election. The court applied the rational basis test in scrutinizing the statute under the Equal Protection Clause.

The Minnesota Supreme Court's decision in this case is consistent with its previous decisions applying the rational basis test to ballot format statutes. In *Gustafson v. Holm*, 232 Minn. 68, 44 N.W.2d 443 (1950), the court upheld under the rational basis test the predecessor statute to Minn. Stat. § 204B.36, subds. 4 and 5 (1992), which required an incumbent designation on the ballot for a judge or a justice running for re-election. Also, in *Ulland v. Growe*, 262 N.W.2d 412 (Minn.), *cert. denied sub nom. Berg v. Growe*, 436 U.S. 927 (1978), the court refused to apply strict scrutiny to statutes which controlled the order in which candidates' names appeared on election ballots, requiring party-designated candidates to be listed before independent candidates. The Court specifically rejected the analysis of *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975) (applying strict scrutiny to a ballot position statute), upon which Peterson would have this Court rely. Pet. at 25. The challenged statutes were upheld under the rational basis test.

Because the designations required by Minn. Stat. § 204B.36, subds. 4 and 5 (1992), are no more burdensome on the exercise of right to vote than the statutes examined in *Clough, Williamson, Gustafson,* and *Ulland*, the Minnesota Supreme Court properly applied the rational basis test in this case.

**2. The *Anderson* decision rested on First Amendment grounds and does not apply in this case.**

Peterson has urged this Court to determine that, even if the Minnesota Supreme Court's rejection of the strict

scrutiny test was correct, the decision should be reviewed because the Minnesota Supreme Court should have applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1973).[6] Pet. at 16-17. By characterizing the *Anderson* test as an alternative to strict scrutiny, Peterson implies that this Court has established a separate equal protection standard that applies only to challenges to state election laws. This contention cannot be sustained.

*Anderson* involved an Ohio law which barred independent candidates from the ballot for President if they did not file a statement of candidacy by March of the election year. The Court found that his restriction "impinges, by its very nature, on associational choices protected by the First Amendment." *Id.* at 793. In striking down the law, the Court held:

> Under any realistic appraisal, the 'extent and nature' of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline.

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[6] The balancing test established in *Anderson* requires the court to 1) consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate; and 2) identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. The court must then consider the legitimacy and strength of those interests and the extent to which those interests make it necessary to burden the plaintiff's rights. Although the test itself mentions the Fourteenth Amendment, the case did not invalidate the statute on equal protection grounds.

Clearly, *Anderson* was a ballot access case which was not decided as an equal protection case and does not establish a test which replaces either the rational basis test or the strict scrutiny test in equal protection challenge.

Peterson has asked this Court to review the Minnesota Supreme Court's equal protection decision. The case was neither argued nor decided as a First Amendment case below, and Peterson does not raise the First Amendment in his statement of the issue. Pet. at i. Therefore the *Anderson* test has no applicability to this case.

### B. Minn. Stat. § 204B.36, Subds. 4 and 5 (1992), Are Rationally Related To A Legitimate State Interest.

Under the rational basis test, this Court accords the legislative judgment a presumption of constitutionality. The Court has stated:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, or decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged be *rationally related to a legitimate state interest.*

*New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). The elements of the rational basis test were recently restated in *Nordlinger v. Hahn*, ___ U.S. ___, 112 S.Ct. 2326, 2332 (1992), as follows:

> [T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, [citation omitted] the legislative

> facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, [citation omitted], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational [citation omitted].

As the discussion below amply demonstrates, Minn. Stat. § 204B.36, subds. 4 and 5 (1992), are constitutional under the rational basis test.

### 1. The incumbency designation required by Minn. Stat. § 204B.36, subd. 5 (1992), is supported by the rational basis test.

The incumbency designation required by Minn. Stat. § 204B.36, subd. 5 (1992), is rationally related to a legitimate state interest. As the Minnesota Supreme Court recognized in its decision in this case, "judicial elections are unique in this state's comprehensive elective scheme," due to the fact that "the powers conferred on the judicial branch differ markedly from those exercised by the other two branches of government." *Peterson*, 490 N.W.2d at 422; Pet. App. at 11A. Because the judiciary must remain independent and "as free from political, economic and social pressure as possible to allow judges to decide cases without those influences," *Peterson*, 490 N.W.2d at 420, Pet. App. at 7A, judicial officers running for re-election lack some of the advantages that other candidates for political office enjoy. As the Minnesota Supreme Court recognized almost 30 years ago in *Foley v. Donovan*, 274 Minn. 501, 503, 144 N.W.2d 600, 603 (1966):

> A great many of our voters are not personally acquainted with members of the judiciary, and particularly, with members of the supreme court. They run on a nonpartisan ticket without benefit of party, platform, or issues. They have little time for campaigning.

The present Minnesota Supreme Court also recognized the restraints imposed upon judicial candidates by the nature of the office itself, stating that it is "a position that requires its holder to studiously avoid partisan politics, to refrain from all discussions of public issues and to restrict one's membership and participation in organizations to those primarily of a professional nature." *Peterson*, 490 N.W.2d at 425, Pet. App. at 16A.

Given these disadvantages, the state has a legitimate interest in providing useful and precise information to the voters as to whether any of the candidates has filled the office previously. That way, the voters may make a more informed choice for an office with which they, with the probable exception of voters who are members of bar, are largely unfamiliar. In *Foley*, the Minnesota Supreme Court stated:

> Our election laws are bottomed on the theory that no candidate for an office ought to be given an unfair advantage over another and *the people ought to be permitted to know whom and what they are voting for.*

*Id.* (emphasis supplied).

The incumbency designation feature of Minn. Stat. § 204B.36, subds. 4 and 5 (1992), is further supported by a rational basis because, as the Minnesota Supreme Court noted, it is part of Minnesota's " 'middle-of-the-road'

approach to judicial selection." *Peterson*, 490 N.W.2d at 425, Pet. App. at 16A. While the election process gives the ultimate choice of judicial officers to the voters, the statutes serve as a quasi-retention feature by informing the voter who is the incumbent candidate whose performance is under review. *Id.* Thus there are plausible policy reasons for the classification created in Minn. Stat. § 204B.36, subds. 4 and 5 (1992), based on legislative facts which rationally may have been considered to be true by the Legislature.[7]

Minn. Stat. § 204B.36, subd. 5 (1992), also meets the last prong of the rational basis test because the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. Where, due to the nature of the office, there are likely to be a large number of uniformed voters, it is logical to identify the incumbent if the voters are to be permitted to know for or against whom they are voting. Thus the statutes here meet all of the tests of the federal rational basis test and were properly upheld under the Equal Protection Clause of the Fourteenth Amendment.

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[7] At pages 21-22 of the Petition, Peterson appears to argue that the legislative purposes underlying the challenged statutes violate Minn. Const. art. VI, § 7 and that the Minnesota Supreme Court interpreted that state constitutional provision too broadly when it upheld the challenged statutes. However, this Court has stated that "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (emphasis added) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). Thus the consistency of the statute with the Minnesota Constitution cannot be brought before this Court.

The Minnesota Supreme Court's decision upholding the constitutionality of the incumbency designation is in harmony with other federal and state court decisions upholding incumbency designation statutes under the rational basis test.

The facts in the unreported decision summarily affirmed in *Binkowski v. Miller,* 411 U.S. 901, 93 S.Ct. 1530 (1973), are extremely similar to the facts in the instant case. *See* discussion in Maurice Kelman, Ballot Designations: A Second Look, 35 Wayne L. Rev. 63, 68-71 (1988). Binkowski, a local district judge, was a candidate for a county probate court seat, and his opponent received the benefit of the incumbent designations provided by the Michigan constitution. *Id.* at 69. The lower court's opinion was rendered in the form of unpublished remarks from the bench. *Id.* The court applied the rational basis test, stating:

> We find it to be a valid and compelling State objective to eliminate as much as possible the participation of judges in the political process. We find the judicial office sui generis, different from the executive and legislative office, and we find the State to have made an appropriate determination to give the people some voice in the selection but at the same time limit to some extent the extent of permissible participation by incumbent judicial officers, and that the determination to afford incumbent officers the designation of their office is reasonably related to this objective.

*Id.* Binkowski appealed to this Court, and the State Bar of Michigan moved to affirm, stating the issue as follows:

> Does the Equal Protection Clause of the Fourteenth Amendment prohibit the State of Michigan from utilizing a "hybrid" system for selecting its judiciary that combines the elective process with a method of incumbency designations rationally designed to minimize the participation of incumbent justices and judges in the political arena and provides some measure of judicial tenure and stability?

*Id.* at 70. As Professor Kelman states in his law review article: "The summary affirmance must be understood as a clear-cut repudiation of Binkowski's equal protection complaint." *Id.*

Although Peterson asserts that the *Binkowski* decision has *no* precedential value, Pet. at 27, this Court has recognized that a "summary affirmance . . . while having less precedential value than an opinion in an argued case, was nonetheless a ruling on the merits." *Southern Railway Co. v. Seaboard Milling Co.*, 442 U.S. 444, 462, 99 S.Ct. 2388, 2398 (1979).[8]

The Minnesota Supreme Court's decision is in harmony with the decision in *Williamson v. Fortson*, 376 F.Supp. 1300 (N.D. Ga. 1974), in which a statute required ballots for the primary election to indicate the incumbent among candidates for the Georgia House of Representatives. The court stated:

> The state has wide discretion to decide what information should be presented to the voters.

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[8] Peterson's attempt to distinguish this case, Pet. at 27, on the grounds that the Michigan Constitution specifically permitted an incumbency designation fails, since the Michigan Constitution is also subject to equal protection review by this Court.

> The court agrees with the plaintiff that it would be desirable for all voters to be well informed in making their electoral choices. The court cannot, however, agree that it is irrational for the state to attempt to provide some minimum quantum of information on which to base his choice among the candidates. The fact that this statute may not be the best possible method to achieve the state's objective is not sufficient to invalidate the statute under the rational basis test.

*Id.* at 1303. The court upheld the constitutionality of the statute.

In *Clough v. Guzzi*, 416 F.Supp. 1057 (D. Mass. 1976), a Massachusetts statute required ballots in primary and final elections to list incumbents first and to designate incumbents. The court had heard expert testimony from which it concluded: "[T]he advantage conferred by incumbency and by first position on the ballot is not one which is easily susceptible to measurement." *Id.* at 1065. The court found that "designation of incumbency does confer a distinct benefit on the incumbent candidate" but had difficulty clearly identifying the extent of any unequal treatment. *Id.* at 1065-66. The Commonwealth of Massachusetts asserted that the incumbency designation was an "informational device" which indicated "in a clear manner who is the candidate for re-election." *Id.* at 1068. The Commonwealth asserted that the most important decision the voter must make is whether to retain or replace the incumbent. The Commonwealth also asserted that "if there is an uninformed segment of the voters, those votes should go to the incumbent candidate who at least has some experience in the business of government." *Id.* The court stated:

> We cannot say that these are illegitimate considerations beyond the authority of the Commonwealth properly and lawfully to advance. The designation of incumbency is material, and the statutory order relevant, to the decision-making process. [Citations omitted.] The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election.

*Id.* The court upheld the statute under the Equal Protection Clause of the Fourteenth Amendment.

Prior to the decision in this case, the Minnesota Supreme Court upheld incumbency designation requirements on judicial ballots in *Gustafson v. Holm*, 232 Minn. 68, 44 N.W.2d 443 (1950). In *Gustafson*, the petitioner challenged the constitutionality of the predecessor statute to Minn. Stat. § 204B.36, subds. 4 and 5 (1992). The 1949 law required that "if a justice or judge is a candidate to succeed himself, the word 'incumbent' shall be printed after his name where it appears among the names of the candidate for office." The court stated:

> Petitioner next contends that the act in question is unequal and partial legislation and that it gives the incumbent an undue advantage over other candidates. Indirectly this may be so, but that does not necessarily invalidate the act. Use of the word "incumbent" following the candidate's name simply informs the voter of the person who presently holds the position. In

> assisting voters to cast their votes intelligently, for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is.

*Id.* at 126-27, 44 N.W.2d at 447. The court pointed out that, depending upon the attitude of the voter toward the incumbent, the designation of incumbency could result in either a positive or a negative vote:

> If [the voter] then believes that the judge should be retained, he has the opportunity of expressing his opinion by his vote. If he feels that the present judge should be replaced, he has a like opportunity of so indicating his opinion.

*Id.* The court identified the legitimate interest being pursued by the state and the impossibility of achieving perfect equality. The court stated:

> The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for. In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.

*Id.* The court upheld the constitutionality of the statute.

Peterson cites only one case which it appears that a requirement for designation of incumbency was struck down: *Rees v. Layton*, 6 Cal.App.3d 815, 86 Cal. Rptr. 268 (Cal. Ct. App. 1970). This decision was considered by the court in *Williamson*, which found itself "in disagreement with the California appeals court that identification of incumbents on the ballots does not have the effect of providing information for the voters," 376 F.Supp. at

1302. The *Williamson* court did not follow *Rees*, nor should this Court.

Because the Minnesota Supreme Court's decision is consistent with the principles of equal protection announced by this Court and with the relevant precedents, the Court should deny the Petition.

**2. The statutory requirement to indicate on the the ballot the name of the justice whose seat is up for election is supported by the rational basis test.**

The requirement of Minn. Stat. § 204B.36, subd. 4 (1992), to indicate on the ballot the name of the justice whose seat is up for election is a natural outgrowth of the provisions of Minn. Stat. § 204B.06, subd. 6 (1992), which state that each justice of the Minnesota Supreme Court is "deemed to hold a separate nonpartisan office."[9] Without naming the justice whose seat is up for election, voters do not know what position they are voting for. As with the incumbency designation, it is legitimate for the state to inform voters as to what they are voting for, and this information is effective to provide that information. *Clough*, 416 F.Supp. at 1068; *Williamson*, 376 F.Supp. at 1302; *Gustafson*, 232 Minn. at 126-27, 44 N.W.2d at 447.

Peterson is in error in arguing that Minn. Stat. § 204B.36, subd. 4 (1992), is in effect an "incumbent first" statute like those struck down in the cases cited at page 24 of the Petition. First, the *physical* placement of the

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[9] The constitutionality of Minn. Stat. § 204B.06, subd. 6 (1992), was never at issue in this case.

justice's name is different than the placement of candidates' names in the "incumbent first" statutes. For example, in *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980), the statute required the list of *candidates* to start out with the candidate from the party who received the most votes in the last congressional election. This meant that the voter looking at the list of names from which he or she must choose saw the incumbent's name at the top of the list of *candidates*. Minnesota's statutory scheme has carefully avoided the potential for positional advantage on ballots for the Minnesota Supreme Court by requiring that names on ballots be rotated. To comply with the rotation requirement of Minn. Stat. § 204D.14 (1992), in this case, two different styles of ballots were printed, one listing Peterson first and another listing Peterson second. See footnote 1, *supra*. These two different styles of ballots were distributed in such a way that half the voters received one style of ballot and half the voters received the other style, thus minimizing any advantage that one candidate would have had over the other as a result of appearing first on the ballot. *Id.* The listing of the officeholder's name in the space identifying the *office* up for election in no way encourages the capricious or indifferent voter (the so-called "donkey vote," *see McLain*, 637 F.2d at 1166) to cast a ballot for the officeholder by checking off whoever is at the top of the ballot.

Even if the designation required by Minn. Stat. § 204B.36, subd. 4 (1992), provides some advantage to incumbents, that advantage does not render the statute unconstitutional. The statute in *Clough v. Guzzi*, 416 F.Supp. 1057 (D. Mass. 1976), provided both for the "incumbent first" position and the designation of the

incumbent.[10] Despite the court's recognition of some advantage, though immeasurable and uncertain, accrued to incumbents from the requirements, the court upheld the statute as furthering a legitimate purpose of government.

In *Ulland v. Growe*, 262 N.W.2d 412 (Minn.), *cert. denied sub nom. Berg v. Growe*, 436 U.S. 927 (1978), the statute required names of party-designated candidates to precede those of independent candidates on partisan election ballots. The case proceeded on the factual assumption that the candidate occupying the first position on the ballot will receive a substantial number of "extra" votes from voters who are either uninformed or uninterested in the candidates. The statute was upheld under the rational basis test as a legitimate method "to assist partisan voters in locating their candidates on the ballot," 262 N.W.2d at 418, despite the assumption that some candidates received an advantage from ballot position. Thus, even if the challenged statute could be seen as

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[10] Other decisions inolving alleged "positional bias" in which the statutes were upheld against an equal protection challenge include *Bd. of Election Comm'rs v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied sub nom. Libertarian Party of Illinois v. Bd. of Election Comm'rs*, 442 U.S. 918 (1979) (established political parties placed in top ballot positions, new political parties placed below); *Bohus v. Bd. of Election Comm'rs*, 447 F.2d 821 (7th Cir. 1971) (Democratic candidate placed on top line of ballot); *Krasnoff v. Hardy*, 436 F. Supp. 304 (E.D. La. 1977) (candidates' names appeared on same horizontal plane); *Voltaggio v. Caputo*, 210 F. Supp. 337 (D.N.J. 1962), *app. dismissed as moot*, 371 U.S. 232 (1963) (political parties given first choice of position on ballot); *Salinger v. Jordan*, 395 P.2d 49 (Cal. 1964) (first ballot position given to incumbent).

an "incumbent first" statute, which it is not, the statute should be upheld.

Peterson asserts that *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975), which struck down an "incumbent first" statute, should be followed in this case. *Gould* is distinguishable from the instant case because, in addition to the fact that Minn. Stat. § 204B.36, subd. 4 (1992), is not an "incumbent first" statute, the California Supreme Court had before it a full evidentiary record that the California statute conferred a "significant advantage" to the candidate in the top ballot position. 536 P.2d at 1340. There was no such record before the Minnesota Supreme Court. In addition, the California Supreme Court applied strict scrutiny to the California statute. As previously discussed, that standard is not the appropriate standard to be used in this case.

Because Minn. Stat. § 204B.36, subd. 4 (1992), is supported by a rational basis, the statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and was properly being upheld by the Minnesota Supreme Court. The Petition should be denied.

## II. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION PERTAINING TO STATE ELECTION LAWS.

It is true that the right to vote is a fundamental right, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and that important federal questions pertaining to state election laws which impair those rights should be decided by this Court. However, the question of whether

states can require incumbency designations on ballots in elections where judges and Minnesota Supreme Court justices are running for re-election is not an important federal question. Neither is the question of whether a ballot for the Minnesota Supreme Court should be allowed to indicate the name of the justice whose seat is up for re-election. The reason is that these types of ballot requirements do not affect the free and unimpaired exercise of the right to vote to the degree that some other state election laws have done.

As discussed *supra* at 8-9, the challenged statutes do not present the potential for denial of access to the ballot, as did the state laws in *Bullock v. Carter*, 405 U.S. 134 (1972) (filing fees), and *Williams v. Rhodes*, 393 U.S. 23 (1968) (restricting the ballot to candidates of only certain political parties). They do not place any restrictions on voters themselves, as did the state laws in *Hill v. Stone*, 421 U.S. 289 (1975) (restricting voting to people who pay property taxes); *Kusper v. Pontikes*, 414 U.S. 51 (1973) (restricting voting for different political parties in different primary elections); and *Harper v. Virginia Bd. of Elections*, 383 U.S. 664 (1966) (poll tax). In fact, the challenged statutes do not place any restrictions on voting, but merely provide the voters with factual information.

This case also does not present any question of impairment of First Amendment freedoms. No First Amendment issue was raised in Peterson's petition filed with the Minnesota Supreme Court, *see* Pet. App. at 18A-21A, and no First Amendment issues were argued to or decided by the Minnesota Supreme Court. This issue was most likely not raised because it is difficult, if not

impossible, to see how providing information on the ballot impairs the voters' right to freedom of association.

Finally, Peterson argues that this Court should decide this case because Minn. Stat. § 204B.36, subd. 4. (1992), is an "incumbent first" statute, and some courts have struck down "incumbent first" statutes. *See* Pet. at 24. However, as discussed *supra* at 22-23, the challenged statute is not a true "incumbent first" statute, and thus this is not a true "incumbent first" case. All of the "incumbent first" cases involved ballots where the incumbent was listed first among the candidates to be voted for. Because of the statutory rotational requirement in Minnesota, non-incumbent judicial candidates are listed first in the list of candidates on half of the ballots.

Because this case does not present an important federal question pertaining to state election laws, this Court should deny the petition.

## CONCLUSION

For the foregoing reasons, petition should be denied.

Dated: March 23, 1993

Respectfully submitted,

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